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IN THE

Supreme Court of the United States

OCTOBER TERM—1941.

Nos. .....

BLACK DIAMOND LINES, INC.,
Petitioner,

—against—

UNITED STATES NAVIGATION CO., INC.,
Respondent.

BLACK DIAMOND LINES, INC.,
Petitioner,

—against—

UNITED STATES NAVIGATION CO., INC.,
Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Black Diamond Lines, Inc., the petitioner herein, prays that writs of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decision of that Court, rendered on January 5, 1942 (R. 30-36), reversing decrees of the United States District Court for the Southern District of New York in favor of the petitioner (respondent in the District Court) and overruling the petitioner's exceptions to the libels herein.

Jurisdiction.

The date of the judgments of the Circuit Court of Appeals to be reviewed is January 21, 1942 (R. 37). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347 (a)) and under General Rule 38 of this Court, Section 5, subdivision (b).

Statute Involved.

The Statute involved is Section 33 (2) of the Personal Property Law of New York, which reads as follows:

> "2. An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement changing, modifying or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge."

Statement.

There are two suits involved, but the libels are practically identical, except for such necessary variations as the names of the vessels, delivery dates, amounts of damages claimed, etc. Since the two records are virtually the same, we shall refer to the record involving the steamer *Black Hawk* as typical. At the

suggestion of the Clerk of this Court, we are filing one petition and brief for both cases, in order to avoid unnecessary duplication.

The respondent sued the petitioner in admiralty in the United States District Court for the Southern District of New York, charging that the petitioner breached oral agreements to charter the petitioner's steamers *Black Hawk* and *Black Tern* to the respondent for certain periods.

The libels (R. 2-5) allege that the parties, on December 27, 1939, entered into oral agreements whereby the petitioner agreed to charter the *Black Hawk* and *Black Tern* to the respondent for a period of two to about five months, trading South Africa, Capetown/Beira range, South America or the Far East, in which agreements were incorporated by reference the provisions of the standard Government form New York Produce Exchange time charter, with certain modifications and additions.

The libels further allege that the terms of the oral charters were to be written out and signed, and that the petitioner's broker accordingly wrote up the agreements (Schedule A, attached to the libels); that the petitioner, when the proposed charters were presented to it for execution, refused to sign them unless they contained a limitation of the period of hire to one round voyage only for the geographical areas mentioned; and that the respondent, because of the petitioner's threatened breach of the oral agreements, signed the written charters with the single round voyage limitation and returned them to the petitioner with a letter (R. 11) stating that as they did not correctly set forth the agreed periods and trading limits they were signed under protest and with reservation of the respondent's rights.

It is further alleged that the vessels entered into the respondent's employment and that each made a voyage from New York to ports in South Africa, Capetown/Beira range, and back to an Atlantic port; that upon the completion of the first round voyage the respondent directed the vessels to proceed on a second round voyage to the South African ports within the specified range and period, but that the petitioner refused to let the respondent have the vessels for the remainder of the period and withdrew them from the respondent's service, and that as a result the respondent was obliged to charter two other vessels for the balance of the period and sustained damages totaling $141,237.66.

The petitioner excepted to the libels on the ground that they failed to state causes of action against the petitioner (R. 12).

Decisions Below.

The opinion of the District Court is printed on pages 13-15 of the record and is reported in 37 Fed. Supp. 1005 (*United States Navigation Co., Inc.* v. *Black Diamond Lines, Inc.*). The opinion of the Circuit Court of Appeals is printed at pages 30-36 of the record. It has not yet been officially reported.

The District Court, taking all well pleaded allegations of the libels as true for the purpose of the exceptions, found that the parties had entered into oral contracts for the charter of the vessels, which were breached by the petitioner when it refused to sign them, after they had been written up, unless the limitation to one round voyage was inserted; that the respondent could have rested on the oral agreements and sued for damages for their breach but

had not chosen to do so, but on the contrary had signed the charter parties in the form demanded by the petitioner, thereby abandoning its rights under the oral contracts, the terms of which became merged in the written signed contracts (R. 13-15).

The Court made findings of fact and conclusions of law, restricted to the disposition of the exceptions (R. 16-21). In its seventh conclusion of law (R. 21) it ruled that the legal consequences of the respondent's execution of the written contracts were not affected by its letter of protest to the petitioner.

The Court sustained the petitioner's exceptions to the libels on the ground that no causes of action were stated against the petitioner, and dismissed the libels (R. 22, 23).

The Circuit Court of Appeals (L. Hand, *J.*, dissenting) reversed the decrees of the District Court and overruled the petitioner's exceptions, with leave to the petitioner to join issue and proceed to trial.

The majority held that the written charters did not cancel or rescind the oral ones because the written charters embodied an agreement for one voyage only instead of two voyages, and that the oral and written charters were therefore *pro tanto* consistent, and the oral charters remained in effect as to a second voyage. The Court also held that the written charters were not effective to displace the oral ones because of lack of consideration and that the respondent's letter of protest and reservation of rights demonstrated that the written charters were not a complete integration of the agreement of the parties. The Court further held that Section 33 (2) of the New York Personal Property Law did not affect the cases and anyway would not invalidate the oral charters unless the written charters amounted to a rescission of the oral

charters, and the written charters, the Court said, were only a *pro tanto* rescission of the oral ones. The Court said finally that the written charters should be treated as a proper attempt by the respondent to minimize damages (R. 30-35).

Judge Learned Hand, dissenting, viewed the respondent's letter of protest as meaning that it accepted the petitioner's offer, because it was forced to, but claimed that it still had its rights under the oral contracts and added that the respondent's defense could rest only on the validity of the excuse and would not be aided by the reservation. He construed the written charters as cutting off the option in the oral charters for a second round voyage and said that the written charters therefore modified a pre-existing contract and thus came directly within the New York statute and needed no consideration. He thought the New York statute applicable to maritime contracts such as these, under the authority of *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, and *The Lottawanna*, 21 Wall. 558, 581 (R. 35, 36).

Questions Presented.

1. Whether the respondent abandoned its rights under the oral charters by subsequently executing the written charters, which were the same as the oral charters, except for the single voyage limitation.

2. Whether the written charters superseded and cancelled the oral charters.

3. Whether the written charters required any additional consideration to make them effective to supersede and cancel the oral charters.

4. Whether Section 33 (2) of the Personal Property Law of New York applies to charter parties executed in New York, and, if so, whether the written charters needed any consideration to make them valid.

5. Whether the written charters constituted a modification of the oral charters, and, if so, whether the written charters needed any consideration to make them valid, in view of Section 33 (2) of the New York Personal Property Law.

6. Whether the respondent could preserve its alleged rights under the oral charters by sending to the petitioner a letter stating that the charters were signed under protest and with reservation of the respondent's rights.

7. Whether the respondent's letter of protest can be considered along with the written charters as showing that the written charters did not constitute a complete integration of the agreement of the parties.

8. Whether the written charters can properly be treated as an attempt by the respondent to minimize damages.

9. Whether the terms of the oral charters were merged in those of the written charters upon the execution of the latter.

10. Whether the parol evidence rule precludes the respondent from relying on the oral charters after its subsequent execution of the written charters.

11. Whether the written charters are conclusively presumed to express the agreement of the parties.

Specifications of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In failing to hold that the oral and written charters were in conflict with each other.

2. In holding that the written charters did not cancel or rescind the oral agreements *in toto.*

3. In holding that the written charters, *pro tanto,* were wholly consistent with the oral charters.

4. In holding that the written charters covered only a part of the subject matter embraced in the prior oral charters and that therefore the written charters were not a substitute for the oral charters, which remained in effect to the extent that they were not included in the written charters.

5. In failing to hold that the second of two conflicting contracts, entered into between the same parties with respect to the same subject matter, supersedes and cancels the first.

6. In holding that the written charters required a consideration in order to be effective as a cancellation and rescission of the oral charters.

7. In holding that the written charters were without consideration.

8. In holding that the cases are not affected by Section 33(2) of the Personal Property Law of New York.

9. In failing to hold that Section 33(2) of the Personal Property Law of New York applies to the written charters and makes them valid without consideration.

10. In failing to hold that the effect of the signed charters was to cut off the option of a second African round voyage, allowed in the oral charters, and that this constituted a modification of the oral charters, within Section 33(2) of the Personal Property Law of New York.

11. In failing to hold that the legal consequences resulting from the respondent's execution of the written charters were not affected by its letter of protest.

12. In holding that the respondent's letter of protest demonstrated that there was no complete integration of the agreement of the parties in the written charters.

13. In failing to hold that the respondent abandoned its rights under the oral charters by executing the written charters.

14. In failing to hold that the respondent should have refrained from executing the written charters, if it wished to preserve the rights which it claimed to have under the oral charters.

15. In holding that the written charters should be treated as a proper attempt by the respondent to mitigate damages.

16. In failing to hold that the written charters are conclusively presumed to express the whole agree-

ment of the parties, in the absence of mistake or fraud, and that evidence of the prior oral charters therefore is not admissible to contradict or modify the written charters.

17. In failing to hold that the terms of the prior oral charters were merged in the written charters.

18. In failing to hold that the respondent's suits on the oral charters were improper, as an attempted evasion of the parol evidence rule.

19. In failing to hold that the written charters constituted a complete integration of the agreement of the parties as a matter of law.

20. In reversing the decrees of the District Court and overruling the petitioner's exceptions to the libels.

Reasons for Granting the Writs.

1. The decision below, in holding that the written charters did not cancel and rescind the prior oral charters, is in direct conflict with decisions of the Circuit Courts of Appeals for the Fifth and Eighth Circuits, in *Consumers' Cotton-Oil Co.* v. *Ashburn,* 81 Fed. 331 (C. C. A. 5); *Housekeeper Pub. Co.* v. *Swift, et al.,* 97 Fed. 290 (C. C. A. 8) and *Luster et al.* v. *Gilruth,* 60 Fed. (2d) 751 (C. C. A. 8). It is also in conflict with the decision of the United States District Court for the District of Oregon in *McCabe Constr. Co.* v. *Utah Const. Co.,* 199 Fed. 976, and the lower Court's previous decision in *Lichtenberg* v. *Harvey et al.,* 57 Fed. (2d) 82 (C. C. A. 2).

2. The decision below, in holding that the written charters were without consideration, and therefore did not cancel or rescind the prior oral charters, is in conflict with all the decisions listed in the preceding paragraph.

3. The decision below, because of its conflict with the decisions listed in preceding paragraph 1, throws into confusion the law as to what legal consequences flow from the execution of two conflicting contracts by the same parties covering the same subject matter.

4. The Court below failed to apply Section 33(2) of the Personal Property Law of New York to these written charters and to hold that they therefore were effective to supersede the prior oral charters without consideration.

5. The decision below, in construing Section 33(2) of the Personal Property Law of New York as inapplicable to the written charters, has decided an important question of local law in a way probably in conflict with applicable local decisions, namely, *Greenwich Sav. Bank* v. *Cabin Holding Corp. et al.,* 176 Misc. 89; 26 N. Y. S. (2d) 791; *Kane Realty Co. Inc.* v. *National Children's Stores, Inc.,* 169 Misc. 699, 8 N. Y. S. (2d) 505; and *Jaeger* v. *Canter,* 13 N. Y. S. 414.

6. The decision below, in holding that the respondent's letter of protest was effective to preserve its rights under the oral charters, is in conflict with this Court's decisions in *United States* v. *Lamont,* 15 Sup. Ct. Rep. 97 (155 U. S. 303), and *Parish et al.* v. *United States,* 8 Wall. 489, and the decision of the

United States District Court for the District of Oregon, in *McCabe Constr. Co.* v. *Utah Const. Co.*, 199 Fed. 976.

7. The doctrine laid down by the Court below makes it possible for a party to execute a complete written agreement, without compulsion, fraud or mistake, and, at the same time, by making a protest, to avoid the legal consequences of his act and preserve his rights under a prior oral agreement covering the same subject matter.

8. The decision below, in holding that the written charters should be treated as a proper attempt by the respondent to mitigate damages, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Luster et al.* v. *Gilruth*, 60 Fed. (2d) 751, and with the decision in *McCabe Constr. Co.* v. *Utah Const. Co., supra.*

9. The decision below conflicts with the rule excluding evidence of prior or contemporaneous oral agreements to contradict or modify a written contract, and also with the rule that a written contract complete on its face, barring accident, fraud, or mistake, is conclusively presumed to express the whole agreement of the parties.

10. The Court below, in holding that the written charters were not a complete integration of the agreement of the parties by reason of the respondent's letter of protest, has laid down a rule in conflict with the ruling of this Court in *Seitz* v. *Brewers' Refrigerating Machine Co.*, 12 Sup. Ct. Rep. 46, 47, 48 (141 U. S. 510).

11. Because of the conflict of the decision below with the decisions of this Court and those of the Circuit Courts of Appeal in other Circuits in the respects stated, and further because of the confusion produced by the decision with respect to the parol evidence rule and the rule as to integration of contracts, and lastly, because of the existence of Section 33(2) of the Personal Property Law of New York, and its probable application to the cases at bar, questions of great importance to the public are presented, which questions should, we respectfully submit, be reviewed and finally settled by this Court.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue writs of certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court full and complete transcripts of the records herein, to the end that the said causes may be reviewed and determined by this Court as provided by law, and that the judgments of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated, February 2, 1942.

BLACK DIAMOND LINES, INC.,
Petitioner.
By JOHN W. CRANDALL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Summary of Argument.

As the points of our argument are substantially the same as the reasons relied on for the allowance of the writs (Petition, pp. 10-13), we shall, in the interest of brevity, not repeat them at this point.

POINT I.

The Court below, in holding that the written charters did not supersede and cancel the prior oral charters, has rendered a decision in conflict with decisions of the Circuit Courts of Appeals in the Eighth and Fifth Circuits, and with one of its own previous decisions.

In *Luster et al.* v. *Gilruth,* 60 Fed. (2d) 751 (C. C. A. 8), the plaintiffs sued on a verbal contract made with one Hermann, under which Hermann agreed, in consideration of assurances given by the plaintiffs in connection with the reorganization of the Gillette Rubber Company, to give each of the plaintiffs one-fourth of the common stock of the new company. Hermann delivered only part of the stock to the plaintiffs, and damages were claimed for his failure to deliver the balance.

The defendants contended that the oral contracts had been cancelled by subsequent inconsistent written contracts. It appeared that about a year after the plaintiffs became entitled to the delivery of the remainder of the stock under their agreement with

Hermann, they entered into a contract of option with Hermann to buy this same stock from him.

The Court said (p. 755):

> "The oral contracts for free delivery of a part of this stock covered by the option contract cannot be enforced at the same time that the option contract stands. They are entirely inconsistent and contradictory. A contract right to have delivered certain stock and another contract for an option to purchase from the same owner the same stock are as different as black and white, and since the two cannot stand together, the one which is later in point of time must prevail as representing the latest legal obligations concerning the subject-matter assumed by parties capable of contracting."

The Court also made some pertinent remarks (p. 755) about a contract for the purchase of the company's common stock following a cancellation of the option contract.

In *Housekeeper Pub. Co.* v. *Swift, et al.*, 97 Fed. 290 (C. C. A. 8), the plaintiff sued to recover $25,000, the alleged balance of the purchase price of a printing and publishing plant and of the good will of the business of publishing a newspaper. The plaintiff contended that the contract price was $50,000 while the defendant claimed that it was $25,000. The Court sustained a demurrer to the complaint and dismissed the suit.

The Circuit Court of Appeals, affirming the judgment, assumed, although it did not find, that two contracts for the sale of the property had been made.

It held that the contracts were inconsistent and that both of them could not stand. There was no allegation of fraud or mutual mistake. The Court said (p. 294):

> "There was but one sale of this property, and this sale could not have been for $50,000. and for $25,000. at the same time. A subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two cannot stand together, rescinds, supersedes, and is substituted for the earlier contract, and becomes the only agreement of the parties on the subject."

The same rule was laid down in *Consumer's Cotton Oil Co.* v. *Ashburn,* 81 Fed. 331, 334 (C. C. A. 5).

In *Lichtenberg* v. *Harvey,* 57 Fed. (2d) 82 (C. C. A. 2), it was claimed that an oral contract to assign property as collateral security for the payment of advances covered the assets of the assignor's business as well as real estate. A written contract subsequently executed covered only real estate. The Court, affirming the judgment on the opinion of the District Court, held that if the oral contract included the business assets, it was superseded by the later written contract.

The rule is well stated in *McCabe Constr. Co.* v. *Utah Const. Co.,* 199 Fed. 976 (D. C. Ore.), where the plaintiff sued to recover damages for the alleged breach of an oral contract with the defendant, and the defendant moved for judgment on the pleadings. The defendant had a contract for railway construction, and sublet part of the work by verbal contract to the plaintiff. The plaintiff commenced performance and shortly afterward the defendant notified the

plaintiff that it would not perform the contract, but would require the plaintiff to do the work at lower prices and under other conditions which were less favorable to the plaintiff. When the plaintiff refused to consent to the proposed changes the defendant gave the plaintiff the alternative of accepting those changes or stopping work. The defendant then presented to the plaintiff a written agreement containing the new terms, and demanded that the plaintiff sign it in place of the original contract. The plaintiff did so under protest and performed the work under the second contract and received payment therefor.

The Court said (p. 978):

> "The second contract covers, and was intended by the parties to cover, the same subject-matter as the first and therefore superseded it. It is a legal impossibility for two inconsistent contracts covering the same subject-matter between the same parties, each intending to fix the entire compensation for the same services, to exist at the same time. When, therefore, the defendant required as a condition to plaintiff proceeding with the work, that it enter into a new contract, fixing other and different prices for the entire work, and it acceded thereto, and signed the contract, such contract necessarily superseded, abrogated, and took the place of the first, as a matter of law, and became the measure of the obligation of both parties."

In the cases at bar, the District Court sustained the petitioner's exceptions on the authority of the above decisions. The Circuit Court of Appeals, however, did not refer to them in its opinion.

The view of the Circuit Court was that the oral

and written charters were not inconsistent with each other because, so it said, the written charters contained promises by the petitioner to carry out the oral agreements to the extent of one voyage only, thus leaving the alleged oral obligation to make the second voyage unaffected. But the same argument could be made as to any of the cases just cited. For example, it could be argued, as to *Housekeeper Pub. Co.* v. *Swift, supra,* that the written contract to purchase the printing plant for $25,000 cash only applied to that part of the prior oral contract providing for a cash payment of $25,000, leaving outstanding the remainder of the oral contract requiring an additional payment of $25,000 in notes.

The oral charters, it should be noted, were for a *period* of two to five months. The upper limit was ample for a round voyage to the Far East but was far too much for a round trip to Africa. It was about right for two round trips to Africa, where the petitioner was planning to send the ships all the time. The oral charters thus permitted the respondent to make two voyages to Africa, whereas the written charters allowed but one voyage. In other words, the oral charters in effect gave the respondent an option for a second African voyage and the written charters had the effect of cutting off the option. A contract for two voyages could no more stand with a contract for one voyage only than the contracts to purchase the same property for $25,000 and $50,000 could stand together, as held in the *Housekeeper Publishing Co.* case, *supra.*

The Massachusetts cases cited by the Court (R. 33) as treating an oral contract as existing in spite of a subsequent written contract on the same subject, are, it seems to us, clearly distinguishable.

In *MacLaren* v. *Windram Mfg. Co.*, 287 Mass. 221, the Court held that there was no patent inconsistency between the oral and written agreements, and that it was just as inferable that the written agreement was intended to extend the oral agreement as to supersede it.

In *Edgar* v. *Joseph Breck & Sons Corporation*, 172 Mass. 581, the plaintiff sued for breach of a warranty that lily bulbs sold by the defendant to the plaintiff were of a certain kind. The plaintiff asked whether the lilies were of the type desired and the manager replied that they were, and then the plaintiff gave him the order verbally. When the bulbs were delivered, they were accompanied by a bill which stated that the defendant did not warrant seeds. Most of the bulbs proved to be of an inferior variety. The Court held that the printed statement had no effect unless it led to the inference that the verbal contract had been rescinded and a new one substituted; that the bill did not establish a rescission of the verbal agreement as a matter of law and that the question was one for the jury.

In *Corey* v. *Woodin*, 195 Mass. 464, the Court held that the facts were such that the second agreement did not necessarily show, as a matter of law, that the former oral agreement under which rights had already vested was rescinded or merged in the new bargain.

The facts in the above cases were totally unlike those involved here, where the parties knowingly and deliberately placed their signatures on complete written contracts which cut down the number of voyages which could be made to Africa from two to one.

The Court below found the written charters ineffective to supersede the oral ones *in toto* because of lack of consideration. Again the decision is in conflict with those previously cited (pp. 15-18). In those cases the necessity of a new consideration to support the second agreement must have been deemed unnecessary for surely all the Judges who participated could not have overlooked the point.

With due deference, it appears to us that the lower Court was inconsistent on the subject of consideration. It upheld the written charters as to the first voyage covered by the oral agreements, but invalidated them for lack of consideration so far as they cut off a second voyage. If they were invalid for lack of consideration they ought to be altogether invalid. We are unable to see how they could effect a partial rescission, as the Court said (R. 33). They were either wholly effective or wholly ineffective. The cases on which the petitioner relies show that they accomplished a complete rescission of the oral agreements.

Furthermore, if consideration is a material factor in cases of this kind the parol evidence rule might just as well be abolished to that extent. Certainly if the rule, as generally stated (*infra,* p. 30) is that all prior oral negotiations, agreements, etc. are merged in the final written agreement, the question as to whether the written agreement is supported by a new consideration cannot be a relevant one if the rule is to have any standing.

The conflict in the Circuits on the questions covered in this point requires, we respectfully submit, that they be passed upon by this Court and finally settled.

POINT II.

The Court below erred in failing to apply Section 33(2) of the Personal Property Law of New York and to hold that the written charters, because of that Statute, needed no consideration and hence were valid and effective instruments to supersede and cancel the prior oral contracts.

The Court said that the written charters lacked consideration and held them invalid for this reason in spite of Section 33(2) of the New York Personal Property Law, which seems designed to cover precisely this situation. The statute (Petition, p. 2) provides that an agreement made to change, modify or discharge, in whole or in part, any pre-existing contract shall not be invalid because of absence of consideration, provided that the later agreement is in writing and signed by the party against whom it is sought to be enforced.

The statute seems worded clearly enough. But the Court held that the written charters constituted agreements to carry out only a part of the petitioner's obligations under the oral charters, and so did not amount to a complete rescission of the previous charters; and that unless there was a rescission or an agreement to rescind implicit in the signed charters (supposedly meaning an implied agreement for a complete rescission) the statute would not invalidate the oral charters.

We respectfully submit that the Court misconstrued the statute. It seems to have passed by two features of the statute, first, that it includes any agreement made to *modify* a prior agreement, and,

second, that it covers an agreement to change or discharge a prior agreement, *in whole or in part.*

Although the petitioner claims that the written contracts rescinded the oral ones completely, it is not necessary for us to go that far in order to sustain the written contracts under the New York statute. If they were not complete rescissions of the oral charters, they certainly were rescissions to the extent of eliminating a second round voyage. Furthermore, since they restricted the respondent to a single voyage, their effect, as pointed out by Judge Learned Hand (R. 35, 36), was to eliminate the option of a second voyage given to the respondent under the oral charters. This, in Judge Hand's view, was a modification of a pre-existing agreement, and, as such, came directly within the New York statute.

The decisions of the New York Courts, cited in subdivision 5 of the title "Reasons For Granting the Writs" (Petition, p. 11), seem clearly opposed to the lower Court's construction of Section 33(2). They draw no distinction between total and partial rescissions, as the lower Court did, and also apply the statute to a modification of a pre-existing contract, as it was intended to be applied.

There is no reason, as Judge Learned Hand said, why Section 33(2) of the New York Personal Property Law should not apply to charter parties. This Court, in *Red Cross Line* v. *Atlantic Fruit Company,* 264 U. S. 109, held that the New York Arbitration Statute, when applied to charters, did not impair or tend to impair the essential uniformity of the maritime law in the United States. See also *The Lottawanna,* 21 Wall. 558, 581.

Because of the lower Court's apparent miscon-

struction of Section 33(2) of the New York Personal Property Law, and its failure to apply that statute here, and to hold the written charters valid thereunder, we submit that an important question concerning the applicability and the scope of the statute is involved herein, and that the question should be reviewed and determined by this Court.

POINT III.

The Court below, in holding that the respondent's letter of protest was effective to preserve its rights under the oral charters and to negative the complete integration of the agreement of the parties, has rendered a decision in direct conflict with decisions of this Court.

The District Court ruled that the legal consequences of the respondent's execution of the written charters were not affected by its letter of protest (Conclusion of Law No. VII, R. 21). The Circuit Court of Appeals, in taking the opposite view, has rendered a decision in conflict with the applicable decisions of this Court.

In *United States* v. *Lamont,* 15 Sup. Ct. Rep. 97 (155 U. S. 303), the War Department advertised for proposals for doing dredging work at New York. The relator submitted the lowest bid and the engineer in charge accepted the relator's proposal. The Secretary of War afterward notified the engineer not to close a contract with the relator.

The work was readvertised and proposals were called for which differed from those contemplated by the first advertisement. The relator again put in a

bid and again was the lowest bidder and obtained the contract under the new specifications. While the bid was pending, the relator sued for a writ of mandamus to compel the Secretary of War to sign a contract with the relator under the terms first advertised.

This Court affirmed the judgment of the lower Court refusing a writ and said (p. 99):

> "Nor does the fact that in making his second contract the relator protested that he had rights under the first better his position. If he had any such rights, and desired to maintain them, he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting, at the time he does them, that he does not intend to subject himself to such consequences. In the case of *Bank of U. S.* v. *Bank of Washington,* 6 Pet. 8, certain payments had been made to the first bank upon a decision by the court below, with notice that the payer intended to take the case to the Supreme Court of the United States, and would expect the payee, the Bank of the United States, to refund the money if that court should reverse the decision of the court below, and hold that it was not due. The court said: 'No notice whatever could change the rights of the parties so as to make the Bank of the United States responsible to refund the money.' "

The Court then quoted an excerpt stated to be from its opinion in *Gilbert* v. *U. S.,* 8 Wall. 358. There seems to have been a mistake. There is no such language in the *Gilbert* opinion, but there is in the *Parish* opinion following.

In *Parish et al.* v. *United States,* 8 Wall. 489, the claimants, pursuant to a notice of D. L. Magruder, the surgeon and medical purveyor of the Military Department of the West, submitted proposals for furnishing ice to all the United States General Hospitals in western and southern areas for the year 1864. The proposals were accepted and a contract was executed by the claimants and Magruder, subject to the approval of the Surgeon-General, by which the claimants were to furnish ice for various places, including New Orleans. The contract was approved and mailed by the Surgeon-General to Magruder, but before it reached Magruder, the approval was reconsidered and the contract recalled, and the draft of another contract was prepared in its place. When the second draft reached Magruder he was directed by the Secretary of War to eliminate New Orleans as one of the places to be supplied with ice, and to have the second contract executed in lieu of the original one. The claimants executed the second contract, protesting against the alteration and stating that they would submit the facts to the officials at Washington and seek redress from them. Notwithstanding their protest, the claimants carried out their obligations under the second contract.

Mr. Justice Field said (p. 490):

> "Upon the facts found by the Court of Claims, it is difficult to perceive upon what ground the contractors can urge any claim for damages against the government. The contract with New Orleans erased, superseded all other proposed contracts. No other had any validity. The action of Magruder, until the approval of the Secretary

> of War, was merely initiatory to a contract. He could not bind the United States in any way.
>
> If the claimants had any objections to the provisions of the contract they signed, they should have refused to make it. Having made it, and executed it, their mouths are closed against any denial that it superseded all previous arrangements."

In *McCabe Constr. Co.* v. *Utah Const. Co.* (*supra,* pp. 17, 18), the plaintiff made a specific protest when it executed the second contract, but the Court held that the protest did not better the plaintiff's position.

In *Consumers' Cotton Oil Co.* v. *Ashburn,* 81 Fed. 331 (C. C. A. 5), the Court, considering a similar situation said (p. 335):

> "If he (the seller) desired to insist upon his rights under the first contract, he should have stood by it, insisting on its performance, and not have made a subsequent arrangement."

The respondent wanted the petitioner's ships, but on its own terms. But it could not get them except on the basis of one round voyage. Therefore, in order to get them, it signed the charters with the one voyage limitation and at the same time tried to convert them into mere pieces of paper by making a protest. Under the decisions of this Court, above cited, this protest was absolutely futile. It was a nullity.

Because of the conflict of the decision below with the decisions of this Court, we respectfully submit that the writs prayed for should be granted.

POINT IV.

The decision of the Court below, in holding that the written charters should be treated as a proper attempt by the respondent to mitigate damages, is in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit.

The respondent asked the Court below to consider the written charters as an attempt by it to minimize its damages, citing *Lawrence* v. *Porter,* 63 Fed. 62 (C. C. A. 6). The Court accepted this contention. But this ruling, we submit, assumes the very point to be decided, which is whether any agreements existed, in connection with which the respondent had any damages to minimize. Obviously, if the oral charters were merged in or superseded by the written ones there would be no breach and hence no damages.

The same argument was advanced in *Luster et al.* v. *Gilruth,* 60 Fed. (2d) 751 (C. C. A. 8), and rejected. The Court said (p. 756):

> "Appellees argue that the sales contract cannot operate as a cancellation of the oral agreements because, by this time, Hermann had repudiated his contracts with plaintiffs and announced that he was going to sell his stock to whomsoever would buy it, and that this contract was a mere device of plaintiffs to minimize their damages through this repudiation by Hermann of the oral agreements. This suggestion is ingenious, but not convincing. There is no evidence of duress by Hermann in the making of this contract, and the courts were open to plaintiffs to protect whatever rights they then had. If they preferred to take care of the situation which confronted them by this voluntary contract, they must assume the burdens as well as having the benefits thereof."

The plaintiff, in *McCabe Constr. Co.* v. *Utah Const. Co.*, 199 Fed. 976 (*supra*, pp. 17, 18), also made this argument. It alleged that it would have been put to great expense in taking its supplies, outfit and men back to Portland, Oregon, if it had discontinued work on the original contract after the defendant's breach, and therefore executed the written contract under protest and only for the purpose of keeping its men employed and to mitigate its damages. The Court, nevertheless, held that the verbal contract was superseded by the written one.

The case of *Endriss* v. *The Belle Isle Ice Co.*, 49 Mich. 279, cited by the lower Court (R. 33), is apparently in conflict with the *Luster* and *McCabe* cases.

Because of the conflict on this point between the lower Court's decision and the decisions in *Luster et al.* v. *Gilruth*, and *McCabe Constr. Co.* v. *Utah Const. Co.*, *supra*, we submit that the question should be reviewed by this Court and finally settled.

POINT V.

The decision of the Court below is opposed to the parol evidence rule, under which all prior oral agreements, in the absence of fraud or mistake, are merged in the written agreement covering the particular subject matter.

The charters drawn up in the unsigned form (Schedule A, annexed to the libels), and the charters which the parties executed, were exactly the same except for the limitation of the charter period in the latter to

one round voyage regardless of the trade in which the vessels were placed (Finding No. 11, R. 18).

Corpus Juris Secundum, Vol. 17, Section 381, pages 872-874, states as follows:

> "A rule of the common law, enacted into statute in some jurisdictions, is that in the absence of fraud a written contract merges all prior and contemporaneous negotiations on the subject, together with all prior oral contracts, and together with and including antecedent correspondence and prior written memorandums, but this is in effect a statement, in different form, of the rule excluding evidence of prior or contemporaneous oral agreements to contradict or to modify a written contract * * *, based on the presumption that, in the absence of accident, fraud, or mistake, the whole engagement of the parties is expressed in the writing."

The libels here allege no fraud or mistake in the execution of the written charters.

In *The Delaware,* 14 Wall. 579, suit was brought for the loss of a shipment of pig-iron, which had been stowed on the deck of the bark *Delaware* and jettisoned in a storm. The bill of lading contained no provision for deck stowage, but the carrier pleaded a prior verbal agreement with the shipper for on-deck stowage. Proof of this verbal agreement was held inadmissible.

This Court said (pp. 603, 604):

> "Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in gen-

eral inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract.

Apply that rule to the case before the court and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed."

See also:

Gronvold et al. v. *Suryan,* 12 Fed. Supp. 429, 430;

Matthias v. *Beeche et al.,* 111 Fed. 940, 941 (E. D. N. Y.);

The Addison E. Bullard, 258 Fed. 180 (C. C. A. 5);

Borin Corporation v. *Commissioner of Internal Revenue,* 117 Fed. (2d) 917 (C. C. A. 6);

Griffin Mfg. Co. v. *Boom Boiler & Welding Co.,* 90 Fed. (2d) 209, 212 (C. C. A. 6);

Ries v. *Dodson,* 46 Fed. (2d) 68, 70 (C. C. A. 3);

Metropolitan Casualty Ins. Co. of New York v. *Banks,* 76 Fed. (2d) 68 (C. C. A. 3);

The Melrose, 1926 A. M. C. 1585 (S. D. N. Y.);

Ainesworth Coal & Iron Co. v. *Grangesberg Oxelosund,* 287 Fed. 291 (C. C. A. 4);

Robbs Express Co. v. *Ferkel,* 200 Ill. App. 471;

Bryant v. *Bryant, et al.,* 295 Pa. 146;

J. B. Colt Company v. *Gregor,* 328 Mo. 1216;

Whittier v. *Goldberg,* 274 Mass. 325.

If the petitioner had sued the respondent for a breach of the written charters, which are complete to the last detail, evidence of the prior alleged oral charters certainly would not be admissible to contradict or modify the written charters. If this is so, it must follow that the respondent cannot evade the rule by ignoring its written agreements and suing on the prior oral ones. And yet the lower Court's decision seems to sanction that very thing.

In Corpus Juris Secundum, Vol. 17, it is stated in Section 381 (p. 874), as follows:

> "* * * a party cannot abandon his written contract and attempt to enforce a previous oral agreement at law, on the ground that the written agreement does not correctly represent the oral one; * * *."

In *Klies* v. *Niagara Fire Insurance Co.*, 117 Mich. 469, the plaintiff sued on an alleged oral contract to insure her house and household goods against loss by fire, by which they were destroyed. The plaintiff's husband, as her agent, applied for the insurance to the defendant's agent, agreed upon the rate, and paid the agent the premium.

The insurance policy, as agreed, was duly drawn up and delivered to the plaintiff's husband. It contained a clause providing that it should be void if the assured then had any other insurance on the property. The plaintiff did have other insurance but claimed that its existence had been disclosed to the agent before the contract was made.

The Court found that the plaintiff was really seeking a recovery upon the oral contract, and decided

against her, one ground of its decision being that she could not disregard the written contract. It said (pp. 473, 474):

> "The plaintiff cannot sustain this declaration by the record—* * *, because the evidence conclusively shows that the parties reduced the result of their various interviews and negotiations to writing, and that the policy accepted and kept by the plaintiff, and the application held by the defendant, are the evidence of the contract. * * *
>
> If, as counsel contends, this policy was not in accord with the oral agreement, she might have had it reformed by applying to a court of equity on the ground of mistake, and rescinded, if not reformed, upon the ground of fraud, if there were fraud. But she has taken a different course. With her written contract outstanding, she seeks to ignore it, and recover upon a *contract for a contract,* and depends for success upon her ability to convince a jury that the written contract that she holds is not such a contract as the defendant agreed to make."

The Court, referring to numerous cases, said (pp. 475, 476):

> "The inference to be drawn from these cases is that, where there is fraud or mistake, equity may afford relief, but will do so cautiously, and will require clear proof of the fraud or mistake. They negative the idea that one may reduce his oral agreement to writing, formally execute or accept and keep it, and at a later time ignore the solemn writing, and bring an action upon a preliminary agreement. This would be an innovation that would render written contracts no better

than oral ones, and practically make them subject to variation and contradiction by parol, and, by indirection, evade one of the best and most uniformly settled rules of law, and render obsolete a branch of equity jurisdiction."

See also:

Luster et al. v. *Gilruth,* 60 Fed. (2d) 751 (C. C. A. 8);
Shea v. *Cutler,* 147 Iowa 366, 126 N. W. 366.

It was argued here—and successfully—that the written charters were not a correct memorial of the agreement between the parties; that there was no integration of the agreement because of the respondent's letter of protest. What the argument seems to amount to is this: That in spite of the fact that complete agreements were signed, without fraud or mistake, the Court can go outside the limits of those agreements, by virtue of the letter of protest, and decide whether they constitute an integration of a prior oral agreement.

The Court's decision holding this permissible, is, we believe, erroneous and in conflict with the rule stated by this Court in *Seitz* v. *Brewers' Refrigerating Mach. Co.,* 12 Sup. Ct. Rep. 46 (141 U. S. 510). This Court there said (pp. 47, 48):

"Undoubtedly, the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case, it may properly be inferred that the parties did not intend the written paper to be a complete and final

statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing."

We submit that the written charters are conclusively presumed to be a complete integration of the agreement of the parties and that the lower Court erred in holding otherwise.

For the reason that the lower Court's decision conflicts with the well established rule against the admission of prior oral agreements to contradict or modify an agreement complete on its face we respectfully submit that the decision should be reviewed and the question settled by this Court.

CONCLUSION.

It is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Second Circuit in these cases should be granted.

Dated, February 2, 1942.

JOHN W. CRANDALL,
Counsel for Petitioner.

FILED
FEB 27 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

Nos. 921 and 922

BLACK DIAMOND LINES, INC.,
Petitioner,

against

UNITED STATES NAVIGATION CO., INC.,
Respondent.

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Petitioner,

against

UNITED STATES NAVIGATION CO., INC.,
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BRIEF OF LIBELANT-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN TILNEY CARPENTER,
Counsel for Libelant-Respondent,
70 Pine Street,
New York, N. Y.

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BRIEF OF LIBELANT-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 30-36) is reported at 124 F. (2d) 508, and 1942 A. M. C. 128. The opinion of the United States

District Court for the Southern District of New York (R. 13-15) is reported at 1941 A. M. C. 354, 37 Fed. Supp. 1005.

Two actions between the same parties are involved, based upon identical facts (except that the charters covered two vessels which made one round voyage to South Africa on different dates), and upon identical issues of law. Both actions were brought in personam in admiralty by the respondent against the petitioner herein to recover damages for petitioner's breach of oral agreements to charter the S.S. *Black Tern* and the S.S. *Black Hawk* to the respondent. The petitioner herein (respondent below) excepted to both libels on the ground that they did not state facts sufficient to constitute a cause of action. Arguments were heard and decided by the District Court and by the Circuit Court of Appeals as one case, though not consolidated. For purposes of convenience respondent submits one brief herein in opposition to both petitions for certiorari.

The Facts

As the petitioner herein saw fit to except to the libels rather than answer them on the merits, the well pleaded allegations of the libels were accepted by both Courts below as a proper statement of the facts which are set forth in the decision of the Circuit Court of Appeals as follows (R. 30, 31):

The libels alleged that on December 27, 1939, the parties entered into oral agreements whereby the petitioner agreed to let, and the respondent to hire, the steamers *Black Hawk* and *Black Tern* for a period of "two to about five months trading South Africa, Capetown/Beira range,

South America or the Far East." They further alleged that it was orally agreed that these vessels should enter upon performance of the charters on completion of discharge of their inbound cargoes and that the terms of the charters should continue during the above periods until their redelivery (unless lost), at a safe United States port north of Hatteras but not north of New York, upon respondent's giving not less than ten days' notice of each vessel's expected date of redelivery. At the time of making the oral charters it was also agreed that the terms of the oral charters should be reduced to writing and signed by the parties. Thereafter petitioner's broker who had brought about the agreements reduced the oral charters to writing, containing all the terms that had been agreed upon orally. But the petitioner, in breach of its agreement, refused to sign these written charters and refused to permit the respondent to have the use and hire of the vessels unless the latter signed written charterparties containing a provision which had not been agreed upon before, viz., a limitation of respondent's use and hire of the vessels to only one round voyage to South Africa, Capetown/Beira range, or South America or the Far East. By reason of this threatened breach of the oral charters respondent on or about January 17, 1940, delivered to petitioner incorrect writings signed by respondent, together with notifications in writing that the written charters did not correctly state the agreed periods and trading limits and that its signature was made under protest and with reservation of its rights. Petitioner received these writings and retained them without objection. Thereafter the steamers entered into respondent's employment and each made a round voyage from New York to South Africa, Capetown/Beira range and return within the period and trading limits of

the oral charter but, in breach of the original oral agreements, the petitioner refused to perform the same for the remainder of the agreed periods of about five months and withdrew the vessels from respondent's service. By reason of the above breaches of the oral agreements respondent was compelled to charter other vessels for the balance of the charter periods and within the trading limits thereof, all to its damage, for which recovery is sought.

Both Courts below also found as a fact that, simultaneously with delivering the signed charterparties providing for only one round voyage, the respondent herein delivered to the petitioner a written communication as follows:

> "In view of your January 15th letter and your other statements that you will not let us have the use of these vessels when their current charters expire unless we sign the charter parties in the form demanded by you—which do not correctly state the periods and trading limits which we agreed upon—we return them herewith duly signed by us, under protest, and reserve our rights in the premises" (R. 18, 19, 32).

Two round voyages to South Africa could have been made under the oral agreements (R. 11, 31-32).

Decision of the District Court

The District Court for the Southern District of New York (Hon. George Murray Hulbert, D. J.) sustained the exceptions and dismissed the libels, saying:

> "There can be no doubt that the oral contract was a firm agreement between the parties, free of all ambiguity or mutual mistake and that there was a breach of that contract after it was reduced to writing and presented to the respondent for execution.

The libelant might well have relied and rested upon that contract and brought suit for damages" (R. 14).

"It seems clear to me that in the execution of the charter parties actually signed by libelant and respondent, the former abandoned its rights under the oral contract, the terms of which were then incorporated in the contract as signed" (R. 15).

Decision of the Circuit Court of Appeals

Upon the appeal of the libelant below (respondent herein), the Circuit Court of Appeals for the Second Circuit (Hon. Augustus N. Hand and Hon. Charles E. Clark, C. JJ.), in an opinion handed down January 5, 1942, reversed the District Court's decision and held that respondent herein had not lost its rights to recover damages for petitioner's breach of the oral agreements. It accordingly overruled the exceptions to the libels with leave to the petitioner herein to join issue and proceed to trial if it be so advised (R. 35).

The majority opinion of the Circuit Court of Appeals held in part that:

"The signed charterparties were without consideration and even if, because of the provisions of the New York Statute [Section 33(2) of the Personal Property Law], no consideration was necessary, they were not a substitute for the prior oral charters because they only covered a part of the subject-matter embraced in the original agreements and the latter remained in effect to the extent that they were not included in the written charters (R. 32) * * * the written charters did not wipe out or rescind the oral agreements. * * * In view of the appellant's notices of protest and reservation of rights which accompanied the signature of the written charters it seems unreasonable to say that the execution of the charters

> signified an abandonment of the option for two voyages granted by the oral agreements or effected more than an agreement to accept a charter for a single voyage and a promise to pay hire *pro tanto* for what was the minimum requirement of the earlier agreement" (R. 33).

The Court further held that the execution of the written charters should be treated as a proper attempt to mitigate damages for petitioner's breach of the oral agreements (R. 34, 35).

Hon. Learned Hand, C. J., dissented upon the ground that, in his view, the oral agreements were superseded by the later written charterparties notwithstanding the particular surrounding facts, and that consideration for such modification was unnecessary by virtue of Section 33(2) of the New York Personal Property Law. Though expressing doubt, he considered that the New York statute should be held to cover maritime charterparties and consequently that petitioner could not be held accountable for its breach of the oral agreements, but added:

> "It is a rather curious irony that a statute, designed generally to avoid injustice, should in this instance operate so harshly" (R. 36).

The Questions Presented

The issues presented to the Courts below were purely questions of private contract law for the chartering of ships. The fundamental question was whether valid oral charters, complete in all their terms and granting the respondent the use of the ships for a period "two to about five months trading" to foreign countries, were, after petitioner's breach, superseded by subsequent written

charterparties which provided for only "one round voyage" to the prescribed ranges; and whether respondent, by having signed those charterparties for "one round voyage" and delivered them with a written communication stating that they did not correctly state the agreed periods and that respondent was signing under protest and with reservation of its rights, nevertheless forfeited its right to damages for petitioner's then existing breach of its oral agreements.

Argument

The opinion of the Circuit Court of Appeals (R. 30-31, 32) contains a complete statement of the facts and shows that the record was carefully examined and considered by that Court. The question of applying the New York Personal Property Law was also considered at length by both the majority and the minority in the Circuit Court of Appeals. The petitioner presents no suggestion that the Court overlooked or misapprehended any essential fact or any of the arguments of counsel.

The petitioner's grounds for seeking review by this Court appear to be based chiefly upon (1) supposed conflict with three decisions of this Court, four Circuit Court of Appeals decisions, and one District Court decision, and (2) the assertion that a State statute is involved and that the decision below creates a "probable" conflict with lower New York State Court decisions.

Petitioner's argument overlooks the fact that in all questions involving the construction of private contracts, a Court's essential inquiry concerns the meeting of the minds as expressed between the parties, and that it must necessarily be guided by the expressed intentions of the

parties under the facts and circumstances of each case. This is particularly true when the question involves the integration of contracts.

The petitioner's argument also overlooks the fact that under the particular facts in this case, the parties had already made completely integrated contracts for chartering the ships for "two to about five months" at the time when they executed the written charterparties for "one round voyage"; that the respondent's written communication which accompanied the signed charters (retained without objection by the petitioner, R. 31) was not a mere "protest" but expressly withheld respondent's assent to integrating the existing oral agreements into the written charters and reserved all rights under the former; and that, as held by the Circuit Court of Appeals, both the oral and the written contracts could stand together without conflict (R. 33).

This fundamental factual situation was absent in all of the decisions of this Court and of the Circuit Courts of Appeals upon which the petitioner relies.

The New York statute is not directly involved. It could enter into the case only secondarily upon a finding that the majority of the Court below was wrong in its interpretation of the contracts. Before the statute could become applicable to excuse the absence of consideration for the written charterparties, there must first be a determination that those written charterparties amounted to an "agreement changing, modifying or discharging" the existing oral contracts. The majority of the Court below, upon careful consideration, held that the written charterparties did not have this effect and hence did not come within the statute. The dissenting opinion thought that

they did, and, with doubts, said "tentatively" that the State statute should be held to cover maritime contracts (R. 36). That such a State statute cannot control courts of admiralty in maritime contracts will be demonstrated *infra*.

POINT I

The decision of the Circuit Court of Appeals is not in conflict with decisions of this Court or of other Courts.

1. The decision is not in conflict with decisions of this Court.

In the Court below, the petitioner unsuccessfully sought to sustain its position that the written charter-parties superseded the oral agreements, upon the purported authority of *United States ex rel. The International Contracting Company* v. *Lamont,* (1894) 155 U. S. 303, and *Parish et al.* v. *United States,* (1869) 8 Wall. 489. The Circuit Court of Appeals' discussion of those decisions (R. 33) shows why they do not apply to the present case.

In *United States* v. *Lamont,* the principal point decided was that mandamus will lie only to enforce a peremptory and plainly defined ministerial duty, as contra-distinguished from a merely discretionary duty, and therefore would not lie to compel the Secretary of War to sign a contract with the lowest bidder for dredging. The fact that the Army Engineer who had accepted the relator's bid requested him to furnish the names and addresses of his proposed sureties and wrote that the "execution of the necessary bond, however, will be deferred until the articles of agreement have been completed in every respect" (p. 304), shows that no contract whatever had

been made at the time the Secretary of War refused to consummate the contract. Thus it is clear that the only contract which the parties made was the so-called "second" one.

This Court then considered the effect of the relator's act in having subsequently made another bid and entering into a contract thereunder at lower prices. It held that even if mandamus would lie, the relator was in no position to avail himself of such relief, because he had entered into the later contract of his own accord, acted under it, taken its advantages and received payment, and was therefore "estopped from denying the validity of the contract" (p. 309). The Court further held that the relator's protests in making his contract did not better his position. Moreover, as held by the Court below, the "second" contract covered the entire subject-matter (R. 33).

The principal feature which distinguishes *United States* v. *Lamont* from the present case—namely, that there was no contract in existence at the time the parties made their "second" one—is disclosed not only by an analysis of the facts, but by the concluding paragraph of the Court's opinion, in which the Court said:

> "The whole case of this relator is covered by *Gilbert* v. *United States*, 8 Wall. 358,"

followed by a quotation which, apparently through inadvertence, is not found in *Gilbert* v. *United States* but does appear in *Parish et al.* v. *United States*, (1869) 8 Wall. 489.

In both *Gilbert & Secor* v. *United States* and *Parish et al.* v. *United States*, the parties made only one contract, and the Court consequently held that their rights were

governed thereby. In the former case the Court held that an Act of Congress directing the Secretary of the Navy to enter into a contract with certain parties did not of itself create a contract, and said:

> "If these transactions are to be construed by the rules which govern agreements between private individuals, there does not appear to be any reason to infer a contract prior to the written agreement between the parties; nor any reason why that agreement should not govern the rights of the parties" (pp. 361, 362).

In *Parish et al.* v. *United States* this Court said:

> "The action of Magruder (Surgeon General), until the approval of the Secretary of War, was merely initiatory to a contract. He could not bind the United States in any way" (p. 490).

The distinction is plain. In the decisions relied upon by the petitioner as ground for review by this Court, the parties were not under contract at the time they made their written agreement. In the present case the parties were bound by valid oral agreements, and the Circuit Court of Appeals correctly held that the subsequent written charterparties did not supersede the oral agreements because, under the facts of the case, the respondent, in writing, had manifested its intent not to rescind the oral agreements. Moreover, consideration therefor was lacking (R. 33).

We deem it unnecessary to dwell at length upon petitioner's contention that the decision of the Circuit Court of Appeals is in conflict with the parol evidence rule or with *Seitz* v. *Brewers' Refrigerating Machine Co.,* (1891) 141 U. S. 510. Its decision is in entire conformity with

those established principles. Petitioner's argument entirely overlooks the existence and effect of respondent's contemporaneous written communication of January 17, 1940 (R. 18-19, 32), which withheld its assent to integration. Integration depends upon expressed intention. Williston, *Contracts,* 1936, Sec. 633; Wigmore, *Evidence,* 3d Ed., Vol. IX, Sec. 2430; *MacLaren* v. *Windram Mfg. Co.,* (1934) 287 Mass. 221, 227. A writing is interpreted as a whole, and all writings forming part of the same transaction are interpreted together. *Am. Law Ins., Restatement: Contracts,* Sec. 235(c).

2. The decision is not in conflict with other Circuit Court of Appeals decisions.

Petitioner's reliance upon *Luster et al.* v. *Gilruth,* (C. C. A. 8th, 1932) 60 F. (2d) 751, is unfounded. In that case the parties, after making oral contracts for free delivery of certain stock, later made inconsistent written contracts for the purchase of the same stock at a price. Upon a full review of a complicated state of facts, the Court held that the later written contract prevailed. In reaching this conclusion the Court found that the only rational explanation of the entire contract was:

> "that all of the parties *recognized* the ownership of this disputed stock to be in Hermann, and Hermann is giving plaintiffs and *plaintiffs are accepting* a contract of option upon all of the stock owned by Hermann at the full net book value of that stock" (p. 755). (Italics ours.)

The Court further found that:

> "It is impossible for us to reconcile this sale contract with the oral contract in any way which will permit both to stand" (p. 755).

Luster et al. v. *Gilruth* is clearly not in point, because in that case the parties intended to integrate the oral contract into the subsequent written one; and the two being mutually exclusive, the later contract was held to prevail. In the present case the respondent, by written communication accompanying the charterparties and retained by the petitioner without objection, expressly denied its assent to such integration. Also, as found by the Court below, the oral agreements and the written charterparties in the present case were not mutually exclusive. Both could stand together, and performance of the written charterparties was *pro tanto* performance of the oral agreements (R. 33).

Likewise, in *Housekeeper Pub. Co.* v. *Swift et al.,* (C. C. A. 8th, 1899) 97 Fed. 290, there was not, as there is in the present case, any writing contemporaneous with the second contract expressing plaintiff's intention to continue the earlier contract in effect or to reserve its rights thereunder. Both contracts being for the sale of the same property at different prices, they were mutually inconsistent and exclusive, and the Court accordingly held that the later contract must prevail.

Similarly, in *Consumers' Cotton-Oil Co.* v. *Ashburn,* (C. C. A. 5th, 1897) 81 Fed. 331, the plaintiff made a second contract without any contemporaneous writing refusing to integrate the earlier contract into the later one or reserving his rights under the former. Moreover, the Court expressed a doubt that any prior contract at all had been made (p. 334).

Lichtenberg v. *Harvey,* (C. C. A. 2nd, 1932) 57 F. (2d) 82, did not involve any controversy between the parties to the contract, the question being whether an unlawful preference in bankruptcy had been acquired by the buyer. It was doubtful whether any oral contract had been made

at all at the time when the parties, freely and voluntarily, made their written agreement.

In *McCabe Construction Co.* v. *Utah Construction Co.*, 199 Fed. 976, a District Court in Oregon held that a written contract which expressly stated that it superseded an earlier contract, had just that effect. The feature which distinguishes that case from the present one appears in the quotation from the Court's opinion at page 18 of the petitioner's brief herein, in which the Court said:

> "The second contract covers, and *was intended by the parties to cover,* the same subject-matter as the first and therefore superseded it." (Italics ours.)

In the present case, the letter which respondent sent with the written charterparties shows that such intent was lacking.

Both the *McCabe* case and *Housekeeper Pub. Co.* v. *Swift* have been criticized for failing to consider the absence of consideration for the later superseding contract. *Schwartzreich* v. *Baumann-Basch, Inc.*, (N. Y.) 105 Misc. 214, aff'd 188 App. Div. 960, aff'd 231 N. Y. 196.

In its efforts to find a conflict between the decision of the Court below and other decisions the petitioner has taken isolated statements of the Courts out of their context, and has failed not only to cite any cases on parallel facts, but, by minimizing the respondent's contemporaneous letter of January 17, 1940 (R. 18-19, 32) to the status of a mere "protest", has overlooked the significance and effect which the majority of the Circuit Court of Appeals correctly accorded to it (R. 32, 33, 34).

3. The decision below is in conformity with established precedents.

Far from being in conflict with other applicable decisions, the decision of the Court below is supported by abundant authority, as pointed out in its opinion (R. 33, 35). Indeed, it applied exactly the principles laid down by Judges Taft and Lurton in *Lawrence* v. *Porter,* (C. C. A. 6th, 1894) 63 Fed. 62 (R. 34). In that case the Court held that upon seller's breach of contract the buyer is obligated to mitigate his damages, even though he must make another contract with the seller, citing *Warren* v. *Stoddart,* 105 U. S. 224; and that:

> "Such a purchase from the seller is not the abandonment of the original contract by the substitution of another, nor would the purchase operate to the seller's advantage, save in so far as the damage resulting from his bad faith was thereby reduced" (p. 67).

POINT II

The Personal Property Law of New York is neither involved nor controlling.

1. Section 33(2) of the New York Personal Property Law does not apply.

The majority of the Court below correctly held that at most this statute validated the written charterparties, but since these were not received in substitution for the oral agreements which were not rescinded, the statute did not affect the situation (R. 34).

In his dissenting opinion, Hon. Learned Hand considered that the written charters necessarily effected a rescis-

sion of the oral agreements, and he assumed that there was no consideration for them (R. 35). Only by his interpretation of the contracts (wherein he dissented from the majority of the Court) did he arrive at the conclusion that the New York statute was involved (R. 36). Thus the statute is only secondarily involved in the matters at issue, and can become applicable only upon a finding that the majority of the Court below was wrong in holding that the written charterparties did not supersede the oral agreements.

2. The New York statute cannot control a court of admiralty in its adjudication of maritime contracts.

Even assuming that the minority opinion's interpretation of the contracts was correct, the New York statute has no force here. That opinion held "tentatively"—though with considerable doubt—that the New York statute should apply to maritime contracts, but added:

> "It is a rather curious irony that a statute, designed generally to avoid injustice, should in this instance operate so harshly" (R. 36).

The chartering agreements in this case, though made in New York, are for the employment of the vessels in foreign trade. There can, of course, be no question but that they are maritime contracts. *Morewood* v. *Enequist*, 23 How. 491; *Matson Navigation Co.* v. *U. S.*, 284 U. S. 352, 358. That oral agreements of charter and affreightment are valid and enforceable in a court of admiralty was not denied by the petitioner herein in either of the Courts below, and the District Court expressly so held (R. 14). This is in accordance with the authorities. *James* v. *Brophy*, (C. C. A. 1st, 1895) 71 Fed. 310; *West India*

S.S. Co. v. *Chicago Housewrecking Co.,* (C. C. A. 2nd, 1918) 249 Fed. 338; *Lutz* v. *Douglass et al.,* (C. C. A. 2nd, 1921) 273 Fed. 685.

In considering that the New York statute applied to such contracts as these, the minority of the Court below apparently overlooked the decision of this Court in *Union Fish Co.* v. *Erickson,* (1919) 248 U. S. 308. Nor does the petitioner's brief herein, wherein it relies upon the State statute as ground for review by this Court, mention that decision. In *Union Fish Co.* v. *Erickson* this Court held that an oral contract for services as master of a vessel, being a contract of a maritime character, was not affected by the Civil Code of California which required such agreements to be in writing. Upon a full review of the authorities, this Court said:

> "The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. * * * If one State may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a State may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States" (pp. 313, 314).

It is respectfully submitted that *Union Fish Co.* v. *Erickson* completely eliminates the New York statute. It follows that, even if the written charterparties had superseded the oral agreements, their lack of consideration was not cured by the statute, the oral agreements remained in effect, and the petitioner should be held answerable for their breach.

POINT III

The petition presents no question of public importance or any other question requiring this Court to review the decision of the Circuit Court of Appeals, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN TILNEY CARPENTER,
Counsel for Libelant-Respondent.

New York, N. Y.

February 25, 1942.